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Supreme Court of the United States

October Term, 1940

No. 117

314-621

HENRY PIRTLE,
Petitioner,

vs.

H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN, Individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity,
Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CRAMPTON HARRIS,
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Birmingham, Alabama.
LEE PRESSMAN,
1106 Connecticut Avenue, N. W.,
Washington, D. C.,
Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

Now comes Henry Pirtle, and petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and in support of said petition respectfully shows the following:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The question in this case is whether the State of Tennessee can make the payment of a poll tax a condition precedent to the right to vote in an election to fill a vacancy in the House of Representatives of the United States Congress.

The facts in the case are not in dispute.

The Governor of Tennessee called a special election for the Third Congressional District of Tennessee on September 13, 1939 to fill a vacancy in the House of Representatives of the United States caused by the death of Hon. Sam D. McReynolds. The election was called for the sole and specific purpose of electing a successor to fill out his unexpired term. No other office of any kind, either local or state, was to be filled by said election.

Henry Pirtle, a resident citizen of Tracy City, Grundy County, Tennessee, possessed all the qualifications required by the laws of Tennessee to entitle him to vote in said special election except one. He had not paid his poll tax.

The Judges of Election at the voting box at Tracy City, Tennessee informed Henry Pirtle that he would not be allowed to cast his vote in this special election. He thereupon filed a bill of complaint (Record pages 1 - 5) asking the court to adjudge that he was entitled to vote in the special election and to adjudge that he was entitled to vote in all subsequent elections, to elect senators from the State of Tennessee and to elect representatives to the Congress of the United States from the State of Tennessee so long as he fulfilled the requirements of residence prescribed by the Constitution of Tennessee, regardless of whether or not he should have paid any poll taxes assessed against him. He also asked for an injunction to prevent the Judges of election from prohibiting, molesting, interfering with or preventing him from voting in said election and from directing or advising in any manner any clerk or election official to deny him the right to cast his vote or to refuse to receive his vote in said election.

The Judges of election accepted service of the complaint and agreed to an immediate hearing thereon. Thereafter,

the Hon. Roy H. Beeler, Attorney General of the State of Tennessee, intervened in his official capacity and the Judges of election took no further part in the case. The Attorney General prayed that the Pirtle petition be dismissed and that he be decreed to be entitled to no declaratory relief at the hands of the court.

The court rendered a declaratory judgment and a decree was rendered which adjudged among other things the following:

> 1. That the plaintiff, Henry Pirtle, is a resident of Grundy County, Tennessee, and a citizen of the State of Tennessee and of the United States and that he is more than 21 years of age and possesses all the qualifications necessary to constitute him a legal voter for members of Congress and members of the most numerous branch of the General Assembly of Tennessee, except that the said Henry Pirtle, although liable for poll tax under the statutes of Tennessee, has not paid the same more than sixty days prior to September 13, 1939. (Record 17)
>
> 5. The Court expressly declares that the plaintiff is not entitled to vote in the special election for members of Congress to be held on September 13, 1939, in the Third Congressional District of Tennessee without the prepayment of poll tax, he being legally liable therefor in the event of the validity of such statutes of Tennessee as apply to him. (Record 19)

The opinion of the District Court appears never to have been officially reported. It is found on pages 13 - 16 of the record.

Henry Pirtle took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit and that Court, on March 8, 1941, affirmed the decree of the District Court

and rendered an opinion which is found on pages 28 - 32 of the record, and is reported in 118 Fed. (2nd) 218.

B.

STATEMENT AS TO JURISDICTION

Jurisdiction is founded on the existence of a federal question. The action and right arise under the Constitution and Laws of the United States and particularly under Article I, Section 2 and the Fourteenth Amendment to the Constitution. The original jurisdiction of the district court is conferred by 28 U.S.C.A. section 41, sub-paragraphs 11 and 14 (Judicial Code, section 24, amended) and by 28 U.S.C.A. section 400 (Judicial Code section 274 d). The jurisdiction of this court is conferred by 28 U.S.C.A. section 347 (Judicial Code section 240, as amended).

THE QUESTION PRESENTED

The sole question presented is whether the Constitution and laws of the State of Tennessee, which make payment of a poll tax a condition precedent to the right to vote in an election to fill a vacancy in the House of Representatives of the United States Congress, contravene the provisions, express or implied, of the Constitution of the United States.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals for the Sixth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this court in that it holds that the privilege of voting for members of Congress is not derived from the Federal Constitution.

2. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal law which has not been, but should be settled by this court, in that it has decided that a State may constitutionally impose a tax upon the right of a citizen of the United States of vote for a member of Congress.

3. The Circuit Court of Appeals for the Sixth Circuit has erroneously decided that the Constitution and statutes of Tennessee, which make the payment of a poll tax a condition precedent to the right to vote for members of Congress are not repugnant to any provisions of the Constitution of the United States.

4. The Circuit Court of Appeals for the Sixth Circuit has erroneously decided that payment of a poll tax as a condition precedent to the right to vote in a Federal election is not a tax on a Federal right.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Sixth Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled, Number 8466, Henry Pirtle, Appellant vs. H. B. Brown, et al, Appellees, and that the judgment of the said court may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HENRY PIRTLE

By:.....

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Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Middle District of Tennessee (Winchester Division) has not been, so far as we have been able to find, officially reported. It is found in the record, pages 13 to 16, both inclusive. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is found in 118 Fed (2nd) page 218, and was rendered on March 8, 1941. It appears on pages 27 to 32 of the record.

II

JURISDICTION

1. The Constitutional provisions involved are Article I, section 2 of the United States Constitution and the Fourteenth Amendment to the Constitution.

2. The Federal statutes giving original jurisdiction to the District courts are 28 U.S.C.A. section 41, sub-paragraphs 11 and 14 (Judicial Code section 24, amended), and 28 U.S.C.A. section 400 (Judicial Code section 274 d).

The jurisdiction of this Court is conferred by 28 U.S.C.A. section 247 (Judicial Code section 240, amended).

III

STATEMENT OF THE CASE

We refer the Court to the statement of the case given in the petition. The facts are so simple as not to require elaboration nor to justify repetition.

IV

ERRORS ASSIGNED

1. The United States Circuit Court of Appeals for the Sixth Circuit was in error in affirming the decree of the District Court of the United States for the Middle District of Tennessee.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the privilege of voting for members of Congress is not derived from the Federal Constitution.

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that a State may constitutionally impose a tax upon the right of a citizen of the United States to vote for a member of Congress.

4. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the Constitution and statutes of Tennessee, which make the payment of a poll tax a condition precedent to the right to vote for members of Congress are not repugnant to any provisions of the Constitution of the United States.

5. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that payment of a poll tax as a condition precedent to the right to vote in a Federal election is not a tax on a Federal right.

BRIEF OF THE ARGUMENT

POINTS OF LAW

Point of Law No. I. The right to vote for members of Congress is a right arising from and fundamentally based on Article I, Section II of the Constitution of the United States.

U.S. v. Classic, et al. In Ms.—decided May 26, 1941
Article I, Section II, Constitution of the United States;
Ex Parte Yarbrough, 110 U.S. 651, 662;
In re. Quarles v. Butler, 158 U.S. 532;
Wiley v. Sinkler, 179 U.S. 58, 62;
Swafford v. Templeton, 185 U.S. 487;
Pope v. Williams, 193 U.S. 621;
Twining v. New Jersey, 211 U.S. 78.

Point of Law No. II. Rights and privileges arising out of the Constitution of the United States are not subject to State taxation in any form.

McCulloch v. Maryland, 4 Wheaton 314;
California v. Pacific Railroad Co., 127 U.S. 1, 41;
McCallen Co. v. Massachusetts, 279 U.S. 620, 628;
Indian Motorcycle Co. v. United States, 283 U.S. 570 at 575;
Trinityfarm Co. v. Grosjean, 291 U.S. 466 at 471.

Point of Law No. III. The Fourteenth Amendment to the Constitution of the United States, in prohibiting any State from making or enforcing any law abridging the privileges and immunities of citizens of the United States, renders invalid and unconstitutional the imposition by the State of Tennessee of a poll tax as a prerequisite to the right to vote for members of Congress.

14th Amendment to Constitution of United States;
Hague v. C.I.O., 307 U.S. 406;
Thornhill v. Alabama, 310 U. S. 88;
Carlson v. California, 310 U.S. 106;
In re. Quarles v. Butler, 158 U.S. 532;
McCallen Co. v. Massachusetts, 279 U.S. 620, 629;
Twining v. New Jersey, 211 U.S. 78.

Point of Law No. IV. Section I of Article IV of the Constitution of the State of Tennessee and Section 2027 of the Code of Tennessee of 1932 do contravene the provisions, either express or implied, of the Constitution of the United States in requiring the payment of a poll tax as a condition precedent to voting for a Representative to Congress.

Article IV, Section I, Constitution of Tennessee;
Section 2027 Michie's Code of Tennessee, 1932;
Ratliff v. Beale, 20 So. 865 at 868.

ARGUMENT

The fundamental axioms from which we proceed are, first, that the United States Constitution is the supreme law of the land, and second that the sovereignty of the Federal Government within its constitutional sphere is supreme and beyond the encroachment of any state. Our basic theorem is that the right to vote for a member of Congress is a right arising from the Constitution of the United States. This basic theorem does not square with the expression of Mr. Justice Butler in the Breedlove case, 302 U.S. 277 at 283. In that case we find this statement:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. Minor v. Happersett, 21 Wall. 162, 170 et seq. Ex parte Yarbrough, 110 U.S. 651, 664-665. McPherson v. Blacker, 146 U.S. 1, 37-38. Guinn v. United States, 283 U.S. 347, 362."

The Yarbrough case, to which the learned Justice refers as an authority in support of his statement, is in fact, an authority directly to the contrary. It distinguishes also the case of *Minor* v. *Happersett.*

The language of the learned Justice is neither supported by the decisions of the Supreme Court nor by fundamental principles of Constitutional law. He was evidently speaking with the Fourteenth Amendment uppermost in his mind and without giving due consideration to Article I, Section II of the Constitution.

The basic theorem which we urged upon the courts below has only this week been established by this court in

the Classic case — in Ms. May 26, 1941. That opinion makes unnecessary a repetition of the arguments we used. The applicable language of the majority opinion is here set out for the convenience of the court.

> "We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*, 110 U.S. 651; *United States v. Mosley*, 238 U.S. 383. And see *Hague v. C.I.O.*, 307 U.S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase 'rights secured by the Constitution' appearing in Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the States, see, *Minor v. Happersett*, 21 Wall. 162, 170; *United States v. Reese*, 92 U.S. 214, 217-218; *McPherson v. Blacker*, 146 U.S. 1, 38-39; *Breedlove v. Suttles*, 302 U.S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Section 2 of Article I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Section 4 and its more general power under Article I, Section 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying

into execution the foregoing powers'. See *Ex parte Siebold,* 100 U.S. 37; *Ex parte Yarbrough, supra,* 663, 664; *Swafford v. Templeton,* 185 U.S. 487: *Wiley v. Sinkler,* 179 U.S. 58, 64.

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough, supra; Wiley v. Sinkler, supra; Swafford v. Templeton, supra; United States v. Mosley, supra;* see *Ex parte Siebold, supra; In re Coy,* 127 U.S. 731; *Logan v. United States,* 144 U.S. 263. And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough, supra; Logan v. United States,* supra. * * * *

"That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our Constitutional scheme of government cannot be doubted."

The pertinent portions of the older decisions on which we relied are to be found at the following pages: *Swafford v. Templeton,* 185 U.S. at 491, (White, J.); *Ex parte Yarbrough,* 110 U.S. at 661 to 664, (Miller, J.); *In re Quarles v. Butler,* 158 U.S. at 535, (Gray, J.); *Wiley v. Sinkler,* 179 U.S. at 62, (Gray, J.); *Pope v. Williams,* 193 U.S. at 633, (Peckham, J.); *Twining v. State of New Jersey,* 211 U.S. at 97, (Peckham, J.).

As we read the dissenting opinion in the Classic case the three justices who dissented did not deny the correctness of our basic theorem.

The right to vote for State officers is primarily derived from the States. As to members of Congress it is derived from the Constitution. The petition in the Breedlove case asked for a writ of mandamus to allow the petitioner to register for voting for Federal and State officers at primary and general elections, without payment of poll taxes. While Mr. Justice Butler did not differentiate between the two classes, yet it seems clear that the presence of the State class must have diverted his attention from the principles applicable to the Federal class. It does not appear from the opinion that Article I, Section II was called to the attention of the learned Justice. It is nowhere mentioned in the report of the case.

RIGHTS AND PRIVILEGES ARISING OUT OF THE CONSTITUTION OF THE UNITED STATES ARE NOT SUBJECT TO STATE TAXATION IN ANY FORM.

The doctrine of immunity from taxation by a State finds its origin in the celebrated decision of Chief Justice Marshall in the case of *McCulloch v. Maryland,* 4 Wheat, 314. It is founded upon the essential nature of sovereignty. That nature has not been changed by any decision of the Supreme Court.

A good expression of the doctrine laid down in *McCulloch v. Maryland,* is found in *California v. Pacific Railroad Company,* 127 U. S. 1 at page 41 as follows:

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United

States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive to the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court is McCulloch v. Maryland, 4 Wheat. 314; Osborne v. The Bank of the United States, 9 Wheat. 739; and Brown v. Maryland, 12 Wheat 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed."

Another expression along the same line is found in *McCallen Co. v. Massachusetts,* 279 U.S. 620 at page 628:

"The aphorism of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 431, that 'the power to tax involves the power to destroy,' has frequently been reiterated by this Court. The principle, of course, is important only where the tax is sought to be imposed upon non-taxable subject, or, as said in Knowlton v. Moore, 178 U.S. 41, 60, '* * * the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope.' Not only may the power to tax be exercised too oppressively, but for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory

to the latter's dignity, subversive of its powers, and repugnant to its paramount authority. See California v. Pacific Railroad Co., 127 U.S. 1, 41."

The privilege of voting and the exercise of that function are most intimately connected with the vital functions of Government. The elective franchise furnishes the means by which members of Congress are chosen. The selection of the individuals to perform the legislative function is necessarily Governmental. It is an essential element of sovereignty.

The franchise is conferred on the individual, not for his benefit but for the benefit of the Federal Government and for the purpose of maintaining the established Constitutional system.

If the states have the power to tax this franchise they have the power to destroy representative government. If they have the power to tax they have the power to say what the tax shall be. They can, therefore, levy a poll tax so high that rich men only will be able to vote.

It is no answer to say that no state has carried the power to such an extreme. It is the existence of the power which conflicts with the Constitution and not merely the possible abuse of that power.

The true doctrine is stated very clearly in the opinion of Mr. Justice Van Devanter in the case of *Indian Motorcycle Co. v. United States,* 283 U.S. 570 at 575:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that

the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector v. Day*, 11 Wall. 113, 125, 127; *Willcuts v. Bunn*, 282 U.S. 216, 224-225. *Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch v. Maryland*, 4 Wheat. 316, 430 ; *United States v. Baltimore & Ohio R. Co.*, 17 Wall. 322, 327; *Johnson v. Maryland*, 254 U.S. 51, 55-56; *Gillespie v. Oklahoma*, 257 U.S. 501, 505; *Crandall v. Nevada*, 6 Wall. 35, 44-46." (Emphasis supplied).

Mr. Justice Butler examines the doctrine of immunity from taxation in Trinityfarm Co. v. Grosjean, 291 U.S. 466 at 471.

> *"Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. Indian Motorcycle Co. v. United States*, 283 U.S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them." (Emphasis supplied).

The elective franchise is not an article of commerce. It cannot be sold by the individual and should never be sold by the State to the individual. To allow the State to tax it is to allow the State to sell it. As sole purveyor of an

object nowhere else obtainable it can fix its own price. What an anomaly! The citizen derives his right to vote for members of Congress from the Federal Government, it is his by grant, and yet he must ransom it from the state. In Tennessee he must deliver the cash for it. A man may work out the road tax, but there is no provision, so far as we can find, whereby the diligent citizen can give of his strength and energy in payment of his right to vote.

It is not an answer to the prohibition against taxation to say that "the electors in each State shall have the qualifications requisite for Electors of the most numerous branch of the State Legislature."

If "qualifications" means those things which fit a man to take part in his government then the payment of a tax is not included. Whether or not a citizen has paid money is no test of his fitness to participate in the selection of Members of Congress. The requirement that a voter be 21 years of age is a test of fitness. At that age one is supposed to have reached a man's estate and to have acquired some maturity of judgment. The requirement that he be a resident for a specified period is a test of fitness. Residence gives familiarity with local problems, conditions and candidates.

If payment of a tax is a qualification we confront the peculiar situation that a corrupt candidate can confer qualification upon thousands of citizens by paying their poll tax. The very thing which should disqualify the citizen as a voter actually qualifies him. It would be a curious line of reasoning to hold that something done by a third person becomes a "qualification" of or in the voter. How can his fitness to share in the responsibilities of the elec-

tive franchise be determined by something external to himself? Was it ever contemplated that individuals should be able to dispense qualifications, confer the right of suffrage and usurp a function of sovereignty?

We submit that the word "qualifications" in Article I, Section 2 was never intended to include a tax and should not be extended by construction to include a tax. Such an extension runs counter to the doctrine of Federal Supremacy.

A grant of power to fix qualifications does not confer the power to levy an unconstitutional tax. No grant of power in the Constitution is to be considered by itself alone. Each must be considered as a part of a vast unified plan. An apparent grant may be limited by an implied prohibition. No grant should be construed in such way as to destroy the organic function of the whole.

THE FOURTEENTH AMENDMENT

The Fourteenth Amendment to the Constitution of the United States reads in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Mr. Justice Butler in the Breedlove case, page 283 seems to assume that if the right to vote were a right arising from the Constitution of the United States it would be protected by the privileges and immunities clause of the Fourteenth Amendment. This court has protected against state action the exercise by individuals of rights guaranteed them by the Constitution. See *Hague v. C.I.O.*,

307 U.S. 406; *Thornhill v. Alabama,* 310 U.S. 88; *Carlson v. California,* 310 U.S. 106. The cases to which we have already directed the attention of the court clearly demonstrate that the right to vote for a Member of Congress does arise from the Constitution of the United States.

There is another statement by the same learned Justice in the Breedlove case to which attention should be directed. He says:

> "Payment as a prerequisite is not required for the purpose of denying or abridging the privilege of voting."

It does not appear where the learned Justice got his information as to the purpose of the legislation. In fact, we believe the purpose of levying this unconstitutional tax was to make an unjustifiable abridgement of the privilege of voting. The State of Mississippi has a poll tax as a prerequisite to the right to vote and the highest court of that state has expressly held that a contrary purpose actuated the legislature. In the opinion of *Ratliff v. Beale,* 20 Sou, 868, 869, the Supreme Court of Mississippi say:

> "In the article of franchise is found the section we have under consideration. True, as argued by counsel, it was a revenue measure, for it imposes a tax. But it is also true that the payment of the tax is one of the qualifications of an elector, and the question is whether its primary purpose is for revenue, with incidental disqualification to vote attached upon its non-payment, or whether the tax was levied primarily as an additional disqualification to those who should not pay it, with the incident of revenue derivable from those who should pay. * * * (Page 869) In our opinion, the clause was primarily intended

by the framers of the Constitution as a clog upon the franchise, and secondarily and incidentally only as a means of revenue."

If the Supreme Court of Mississippi is correct then the State of Tennessee no doubt provided for a poll tax not merely to raise revenue but to abridge a Federal franchise. An examination of the Tennessee statute and Constitution shows a concentrated attention on the poll tax. Section 2027 of the Code provides that:

> "Every person in this State, who is otherwise, a qualified voter under the constitution and laws, shall, as a condition precedent to the exercise of voting, furnish to the judges of election satisfactory evidence that he has paid the poll tax, if any, assessed against him for the year next preceding the election, not later than sixty days prior to the day of said election, without which his vote shall not be received."

The Constitution provides in Article IV, section 1, that:

> "There shall be no qualification attached to the right of suffrage, except that each voter shall give to the Judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes, etc."

It would be a strange perversion of Article I, section 2 of the Constitution of the United States to say that under it a State could make the payment of a tax the only qualification for voting.

THE OPINION BELOW

We submit that the Breedlove case does not accurately interpret previous decisions. Neither did the Court of Appeals accurately interpret the decision in the Breedlove case. In the last complete paragraph of the opinion the Court of appeals say that the decision in the Breedlove case is a conclusive decision against petitioner's contention "that his right to vote for a member of Congress is not taxable, regardless of whether the amount of the tax imposed is trifling or substantial." We do not so understand the Breedlove case. That decision held that the right to vote for a member of Congress was not derived from the Constitution and was therefore not protected by the Fourteenth Amendment. It did not hold that a state may tax a federal right.

The appellant in the Breedlove case argued his appeal upon the theory of class discrimination. He also argued that the tax was unreasonably imposed. That is not our approach. We say that a tax upon the right to vote for a member of Congress is a violation of the U. S. Constitution regardless of reasonableness. It is not a question of degree but a question of power.

At page 30 of the record the opinion of the court below contains this statement: "It is clear enough that these provisions do not levy or assess a poll tax upon voters as a class. Voters are nowhere referred to." The learned Judge below also stated, "It is worthy of note that the tax is levied by that section of the Tennessee Constitution dealing with taxation, while the disqualification of the voter for failure to pay it is found in that section dealing with the qualification of voters." The classification of

the draftsman may shed some light upon his intention, either to classify or to conceal but the effect of the law is not thereby changed. The effect of the Tennessee system is to deprive a voter of his right to vote unless he pays a tax. If the impact of a law results in the destruction of a Federal right, neither silence nor any form of words should hide from the court the actual result achieved. Cleverness in wording or in classification or in keeping silent can not avail to circumvent the Constitution. The protection afforded by that instrument is not limited merely to direct attack but extends to all forms of cunning contrivances.

The Tennessee Constitution, Article 11, section 12, provides that "the State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the general assembly shall, from time to time, direct by law." The opinion of the court below seems to attach some importance to this fact. The use to which the tax was put no doubt served to restrain many citizens from assailing the tax. They would hesitate to be put in the position of being opposed to education. But we cannot see where the subsequent use of the proceeds of an unconstitutional tax can be used as a valid argument for its constitutionality. If such an argument could prevail charitable motives and benevolent uses would indeed cover a multitude of unconstitutional taxes.

CONCLUSION

It is not necessary to decide whether or not the payment of the poll tax as a condition precedent to the right to vote was levied from good motives or from bad motives. There is no question of degree involved in this case. The tax is either constitutional or unconstitutional. It must stand or fall as it exists without speculation as to whether it is a reasonable tax or not. The Constitution does not say that a State can levy a reasonable tax on a Federal franchise any more than it says a reasonable tax can be laid by a state on interstate commerce or the mails. It does not say that a State can reasonably abridge the rights and privileges of a citizen of the United States. It says a State cannot abridge them at all.

We respectfully submit that the Constitution of the United States and the decisions of the Supreme Court entitle this petitioner to a writ of certiorari and the ultimate reversal of the courts below.

Respectfully submitted,

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